SUBJECT INDEX.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 655.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONERS,

versus

NICHOLS & COMPANY, RESPONDENTS.

BRIEF FOR THE RESPONDENTS.

The petition for a writ of certiorari which is asked to be directed to the Supreme Court of Mississippi, according to the printed copy submitted to respondents, is not accompanied by a certified copy of the entire transcript of the record in the case, which would appear to be one of the requirements deemed as a condition precedent to a consideration of the petition.

Lau Ow Bew, 141 U. S., 583.

Because of this omission and if the petition is to be considered, it is difficult for the respondents to make a satisfactory reply to it.

It would seem difficult, also, for the Court to gather exact and accurate knowledge of the questions involved without considering the whole case.

The facts as shown by the record are undisputed. The petitioners offered no evidence in contradiction or which challenged the correctness of any statement of fact presented by the respondents upon the trial of the case.

The case originated at law in the Circuit Court of Coahoma County, Mississippi. The respondents are farmers, who availed themselves of the facilities of the petitioning railroad company for the shipment of cotton from a station named Alligator, Mississippi, near which their farming interests were located, to Memphis, Tennessee. The respondents, on November 3rd, 1917, delivered to the railroad company, thirty-one bales of cotton, loaded in one of its cars, consigned to Goodlett & Company, at Memphis, Tennessee, which cotton was of the value, approximately, of seven thousand dollars. The cotton was destroyed by fire before it left Alligator. This cotton was handled by the railroad company in the same way in which it had previously handled something like eight or ten thousand bales of cotton for the respondents, the handling of cotton in this way having extended over a period of several years.

Alligator is a small station on the line of the railroad, but the business which was handled by the railroad at this station was disproportionate to its size and the facilities of the railroad. Among other freight handled at this station were about ten thousand bales of cotton during a cotton season, beginning in October and ending in the spring, which cotton was handled in carload lots, and besides this, there were thousands of other carloads of freight handled in carload lots to and from the same station. This did not include freight handled at the station in less-than-carload lots, which freight was unloaded directly into a small depot there.

The only facilities for handling freight, in the way of railroad trackage, consisted of a short track called a "house

track," which was laid in front of and near the depot and depot platform, and between the depot and the main-line track of the railroad company and what was called by the witnesses a "team track," which deflected from the main-line track something like sixty feet south of the depot, and extended southeasterly from the main-line track a distance of nine hundred or one thousand feet. This track was the only track upon which and by the use of which carload freight incoming and outgoing was handled, and it had been built and in operation something like twenty-one years before the loss of respondent's cotton.

The agreement under which this "team track" was built was unknown to the public, and it appears affirmatively in the record that it was entirely unknown to respondents. The agreement consisted of a writing entered into between the vice-president of the railroad company and one Rainer. After the agreement had been made it had not been placed of record, but one copy of it had been kept in the private files of the railroad company and the other copy had been kept locked up in Rainer's safe.

The agreement in terms provided that Rainer should furnish free of cost to the railroad company all of the ground needed for the construction, use, and maintenance of the side track, and that the railroad company should have "sole and exclusive possession, and the quiet and peaceable enjoyment thereof;" and furthermore, that the railroad company "shall be the owner of and have sole control of the said spur or side track and all material used in its construction, and that the same shall remain personalty and shall not become a part of the realty."

The track was constructed by the railroad company and maintained just like the other trackage owned by the company, and the railroad company had exclusive control over the same.

Mr. Rainer stated: "That it was the only team track in the town. We had a house track at that time, but it was not

arranged so that the teams could unload except at great inconvenience, and this track has been used by the general public there for loading and unloading of all carload lots for quite a good many years."

The record clearly shows that the depot agent for the time being, at Alligator, had sole and exclusive control of the track. This is taken from the testimony of Rainer:

> "Q. What objection had been made at any time to their sole and exclusive use of that property? A. None whatever.
>
> "Q. I will ask you to state whether or not the public has availed themselves of the use of said side track under the instructions of the railroad company? A. They have.
>
> "Q. And has there been any modification or change of these uses at any time? A. No, sir.
>
> "Q. Either before or after the fire? A. No, sir.
>
> "Q. How has the maintenance of that side track been kept up by the railroad company as compared with the other side track? A. Same maintenance by the section crew.
>
> "Q. Who furnished all the material for keeping it up? A. The railroad company.
>
> "Q. How long has the railroad company had an agent at Alligator? A. Ever since I have been there, twenty-one or two years.
>
> "Q. Who has directed the placing and handling of cars on that side track? A. The depot agent down there." * * *
>
> "Q. Who has the power to direct the placing of cars on that track? A. The depot agent.
>
> "Q. Who else has the power to place cars on that track? A. The conductors.
>
> "Q. Who else outside of the employees of the railroad company? A. I do not know that anybody else, except the employees of the railroad company.
>
> "Q. That continued to be so continuously from the time the track was built up until shortly after this fire? A. Yes, sir."

The universal custom in handling carloads of freight on this side track was as follows: When carload freight would come in the depot agent would have it placed on the side track, the consignee would be notified of its arrival, he would pay freight and unload, as is the case in the handling of all "team track" freight, on other tracks at other stations.

In the case of outgoing freight, when a requisition would be made upon the agent for a car, such a car would be placed as the consignor might desire; the consignor would then load, close the car, report destination to the depot agent, and secure a bill of lading. As to cotton, this was found stacked up on the platforms of two gins; the location of the cotton to be shipped would be given to the agent; he would cause a car to be placed for loading, and when loaded the car was closed, the destination and consignee reported to the agent, who would issue a bill of lading for the same, and all of these cars were handled indiscriminately by local freight trains—it being the custom for the first local train passing north or south, as the case might be, to pick up cars bound in the direction the particular train was moving. Frequently it was inconvenient for consignors of cotton to load from the cotton platforms at the gins, owing to the congestion there, but as the cotton platform at the depot was capable of holding, as one witness said, only about fifty bales, and another only about one hundred bales, and as it was practically impossible to load cotton into cars so as to get a carload of cotton into a car placed on what is called the "house track" adjacent to this cotton platform, all carload cotton had to be loaded from the gin platform. This was the course which was followed in the present instance.

Respondents had a carload of cotton to ship; they asked for a car; the agent had the car placed on the side track to receive a carload of cotton; notified the respondents of its location, and respondents loaded it; reported the loading, consignee and destination, and received a bill of lading for the carload of cotton; and then under all the usages of the

place, the consignors were relieved of all further responsibility with respect to the care or handling of the cotton, that being left solely and exclusively to the direction and upon the responsibility of the railroad company.

The cotton was loaded on November 3d, 1917, and was destroyed by fire communicated from one of the gins on November 4th, 1917.

At the time of the fire there were several other cars on this side track, placed there by the railroad company, which made it impossible after the fire began for the carload of cotton to be moved to a place of safety, the way being blocked by these other cars, three or four in number.

The record does not show how many trains passed going north after the car was loaded and bill of lading was issued, but it is clear from the evidence that more than one train did pass north thereafter.

The respondents sought a recovery on this state of facts. To the declaration based thereon the railroad company pleaded the general issue, and as special matter in avoidance set up the fact, "that the said cars on which the said cotton was loaded as aforesaid, were at the time they were so loaded on a private or other siding or side track located near the defendant's depot building at Alligator, Mississippi," and that without negligence on the part of the railroad company, "all of the said cotton was destroyed before it moved from the point of shipment, Alligator, Mississippi, under the said bill of lading above referred to, and before it was moved from the said private or other siding or side track last aforesaid."

The bill of lading referred to as having been issued did not state the rate of freight per hundredweight or otherwise. It is perfectly blank in that respect. It does contain the language quoted in the petition for a writ of certiorari, and that is:

> "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after

unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from the trains."

The bill of lading with the clause stated was introduced in evidence without objection, and the Court gave full force and effect to the bill of lading and all of its provisions, but, considering the facts, which were undisputed, determined that the track in question was a team track under the immediate supervision of the depot agent of the railroad company; the furthest extremity away from the depot was only two hundred and forty yards, and the nearest something between fifty and sixty feet. There was no contention made in the trial court that by any action of the trial court the railroad company was denied the benefit of any title, right, privilege, or immunity which it was entitled to under the Constitution or laws of the United States. No plea of any such title, right, privilege, or immunity was interposed by the railroad company. No such claim of denial was made in the trial court on the motion for a new trial, and the case was closed in the trial court upon the determination of a simple question of fact, as the evidence was made referable to the provisions of the bill of lading or contract of shipment.

In the course of the trial the respondents sought to show that they knew nothing about the contents of the bill of lading; that their attention was not called to the printed matter on the back thereof, but the Court sustained an objection to this testimony, and held that the bill of lading as issued was controlling, and thus gave full force and effect to the contract which the railroad company relied upon in stating its defense.

After the trial and judgment for respondents the railroad company prosecuted an appeal to the Supreme Court of Mississippi, in accordance with the laws of that State, and the case was there heard again.

The assignment of errors filed in that court does not specify that any title, right, privilege, or immunity was denied to the railroad company by the trial court, and no action of the trial court in any such respect was pointed out as the basis for the contention of the existence of any such denial.

The case was argued by the respondents in the Supreme Court of Mississippi upon the proposition that the interstate commerce statute was valid and effective and operated to determine the rights of the parties in the present litigation.

Respondents contended that the side track upon which the cotton was placed at the time it was destroyed was a "team track" and a part of the station facilities of the railroad company at Alligator, and furthermore, that giving full effect to all the stipulations of what is termed the standard bill of lading, the clause relied upon by the railroad company did not apply and could not be determinative of the rights of the parties, because there was a depot agent at Alligator, and because the facts showing delivery upon the "team track" of the railroad company did not warrant the application of any provision of the bill of lading as a bar to the right of respondents to recover.

The Supreme Court of Mississippi decided that the record shows the facts which we have heretofore stated. The evidence not being conflicting in any respect, the Supreme Court of Mississippi expressly found that the track in question, called by the witnesses the "team track," and another, which track extended along the side of the freight-house, known as the "house track," were the only tracks at the time in Alligator for the handling of the railroad company's business, and that between fifty and seventy-five per cent of all carload shipments were handled on this team track, and that the shipping public generally used this "team track" or, as the undisputed testimony of Rainer states it, "this track has been used by the general public for loading and unloading of all carload lots for quite a good many years," and "to this end a track scale was placed on this team track"—which track

scale was used by the public for weighing in and weighing out incoming and outgoing freight as a basis necessarily for the computation and the collection of freight on incoming shipments in carload lots, and the payment of freight on outgoing freight in carload lots.

The Supreme Court also held that the respondents had "no proprietary interest in the gin track and, therefore, had no control over the car after it had been loaded and the bill of lading issued."

These findings of fact must necessarily have resulted in an affirmance of the judgment of the trial court, but further discussing the terms of the bill of lading and giving full effect to it, the Court held that the stipulation relied upon by the railroad company could not be related to a station at which the railroad company maintained an agent, but that the stipulation referred to applied only to stations at which the railroad company maintained no agent. All the inferences of fact drawn from the evidence conducted inevitably to the conclusion that so far as respondents are concerned, they were dealing with the railroad company without knowledge of a secret understanding or agreement between Rainer and it, and acted in good faith in believing the representations of the railroad company, that the track upon which their carload of cotton was standing was a part of the station facilities of the railroad company at Alligator, and that good faith would not permit the railroad company to dispute the effect of this conduct on its part, and thereby defeat respondents' claim to compensation for cotton destroyed without fault on their part, and after they had made a complete delivery of it to the railroad company.

It is upon this state of the record that petitioners pray for a writ of certiorari seeking to reverse the aforementioned finding of facts and conclusions reached thereon by the Supreme Court of Mississippi.

ARGUMENT.

The State Court had Jurisdiction of the Cause of Action and the Parties.

It is well to bear in mind that this is a suit brought by a shipper, to enforce a liability against a carrier which existed at the common law before the enactment of the Carmack amendment, and which the shipper insisted existed after the enactment of the Carmack amendment, by virtue of the terms of the contract of shipment between shipper and carrier, these terms being set out in a bill of lading.

As to the proposition that the State courts have concurrent jurisdiction with the Federal court of suits brought to enforce liability in such cases, we first refer the Court to the case of Galveston, Harrisburg & San Antonio Railroad Co. *vs.* Wallace, 223 U. S., 481.

This was the first case after the enactment of the Carmack amendment, where was brought in question the jurisdiction of a State court to enforce a liability against an initial carrier of an interstate shipment. The carrier insisted that the jurisdiction of such causes of action rested wholly with the various Federal courts, but this Court held otherwise.

> "The real question, therefore, presented by this assignment of error, is whether a State court may enforce a right of action arising under an act of Congress. * * * Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the State governments, there is no presumption that Congress intended to prevent State courts from exercising the general jurisdiction already possessed by them, and under which they had

the power to hear and determine causes of action created by Federal statute.

Robb *vs.* Connolly, 111 U. S., 637.

> "On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State court as well as in those of the United States."

This proposition, however, is not denied by petitioners, and we will not continue the argument further, merely citing two other cases where this Court has followed the Wallace case, *supra:*

Penn. Railroad Co. *vs.* Puritan Mining Co., 237 U. S., 121.

Eastern Ry. Co. of New Mexico *vs.* Whittlefield, 237 U. S., 140.

Now if the State court had jurisdiction of the parties and of the subject-matter in this suit, upon what theory may the petitioners invoke the jurisdiction of the Supreme Court of the United States? This can only be done, if at all, by virtue of the provisions of section 237 of the Judicial Code, section 1214 of the United States Compiled Statutes 1916. The material part of this section declares that in cases where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty of, statute of, or commission held or authority exercised under the United States, then the same may be brought up before this Court by a writ of certiorari.

It is petitioner's claim now that they have been denied a title, right, privilege, or immunity granted them by the Carmack amendment, and because of the denial of this right they seek a review of the decision of the Supreme Court of Mississippi. Let us say at the outset that neither the Carmack amendment nor any other act of Congress declares that

carriers in interstate commerce shall have the right to have their rights determined by the Supreme Court of the United States in a case similar to the one at bar, but, on the contrary, the Supreme Court of the United States has decided that the State courts do have jurisdiction of such suits, as heretofore pointed out. So we come back to the original proposition that this Court has jurisdiction only upon the theory that the petitioners have been denied a title, right, privilege or immunity granted them by the said Carmack amendment.

No Federal Question Was Raised in the State Court.

It is elemental that the Federal question, if any be involved in this litigation, must have been raised in the State court in order for this Court to consider the same now. As stated before, there is no statement in the motion for a new trial filed by the petitioning railroad company, in the trial court, nor in the assignment of errors, which could be construed as remotely raising a Federal question. The only pleading upon which petitioners may now rely to raise the question relied upon is in the notice of special matter filed in connection with the railroad company's plea of the general issue. This notice was so filed in accordance with section 744 of the Mississippi Code of 1906, which is as follows:

> "*Notice of Special Matter under General Issue.*— If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall before the trial of the cause, file a writ-

ten notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been neces-ary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible upon the trial."

In addition to the fact that the railroad company in its notice, after alleging that the said cotton was not destroyed by their negligence, made this statement:

> "That the said cars on which the said cotton was loaded as aforesaid, were at the time they were so loaded on a private or other siding or side track, located near the defendant's depot building at Alligator, Mississippi."

It is palpable, of course, that the purpose of this statement and the purpose of the proof adduced at the trial, was to prove that the railroad company was relieved of liability in this particular case because of that exemption inserted in the bill of lading which we have quoted heretofore. The trial court and the State Supreme Court have both decided that the facts of this case do not bring it within that stipulation.

Our next inquiry is whether or not the Federal question, if any, was properly raised in the State courts, so as to give this Court jurisdiction. We have already stated the facts.

To give the Court jurisdiction it must appear by the record that a Federal question was raised and decided adversely.

Gaar, S. & Co. *vs.* Shannon, 223 U. S., 468.
Waters Pierce Oil Co. *vs.* Texas, 212 U. S., 86.
C. & O. Ry. Co. *vs.* McDonald, 214 U. S., 191.

That proposition is too well settled by this Court to require the citation of further authority.

> "Appellate jurisdiction over a State court cannot be based on a supposed denial of a Federal right, not urged in a trial court, or called to the attention of or decided by the State appellate court."
>
> Cincinnati & N. O. T. P. R. R. Co. *vs.* Slade, 216 U. S., 78.

In the light of this decision, it is to be noted that the railroad company, the only litigant in either State court, did not urge that by a decision contrary to its contention it would be denied a title, right, privilege, or immunity arising to them out of a Federal statute, but on the other hand it simply insisted, first, that the stipulation in the bill of lading was binding upon the shipper, which the Court conceded in making its decision, and it insisted, secondly, that the stipulation upon which it relied, being binding, then the particular facts exempted it from liability. This the Court found against it. This is the denial of the right claimed to constitute the Federal question here.

> "The proper way of raising a Federal question is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that it was presented to the State court."
>
> Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291.

This Court has made the distinction for which we now contend in the case of Louisville & Nashville R. R. Co. *vs.* The City of Louisville, 166 U. S., 709.

This was a suit filed by the railroad company against the city of Louisville to recover certain taxes which had been collected by authority of an act entitled "An act to revise and amend the laws of the city of Louisville." It was tried upon an agreed statement of facts, and after the chancery court had decided the case against the company, and that decision

ıd been affirmed by the Court of Appeals of Kentucky, the ɔmpany attempted to raise the question of the validity of ıe State statute, but the Court held that it was too late.

Another case where this Court pointed out the fact that ısisting that a certain contract was to be governed by the ecisions of the United States Supreme Court, and in which ıey held that such an insistence does not raise a Federal uestion, is the case of El Paso & S. W. R. R. Co. *vs.* Eichel Weikel, 226 U. S., 589. The Court in that case used this anguage:

> "But assuming (without, however, conceding) that the plaintiff in error was entitled to a right, privilege or immunity in the premises, derived from the Federal Constitution or laws, the question remains whether such right, privilege or immunity was specially set up or claimed. An examination of the record discloses that while it was repeatedly insisted that the rights of the parties under the contract should be determined according to the laws of the Territory of New Mexico, that such law was to be ascertained from the reported decisions of this Court, and that under those decisions the clauses that gave finality to the decision of the company's engineer were valid and binding, and that the plaintiff's action was foreclosed thereby, it was not suggested that in so insisting the plaintiff in error was asserting or relying upon any right, privilege or immunity or laws of the United States. * * *
>
> "The points raised by plaintiff in error that are now relied upon as an assertion of Federal rights were brought to the attention of the trial court and of the Court of Civil Appeals like any other of a multitude of questions that were raised in those courts; and so far as appeared the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the decisions of this Court, or the authority of those decisions, as laying down the law of the Territory of New Mexico, but rather upon the proper interpretation of the contract, the clause that was cited as giving finality to

> the decision of the company's engineer, was not applicable to the questions in controversy.
>
> "We, therefore, deem it clear that the plaintiff in error did not lay the foundation for a review under section 709, Revised Statutes, either in the trial court or in the Court of Civil Appeals."

Respondents in this case insist that the fact that the railroad company sought to set up facts in its special matter under the general issue which would relieve it from liability under the terms of its contract with the respondents, and the mere fact that the Court decided that these facts did not relieve it from liability under the contract, was not raising a Federal question as contemplated by the former decisions of this Court.

We recognize the authority of the case of St. Louis, Iron Mountain & Southern Ry. Co. *vs.* Starbird, 243 U. S., 592. In this case, which was a case arising out of the Carmack amendment, the Court discussed somewhat at length the question of when a Federal question is properly raised in a State court. The substance of this decision is best expressed in the language of the Court, as follows:

> "The Federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in a proper manner called to the attention of the Court. Section 237 of the Judicial Code does not require that the statute creating the right shall be especially set up. The courts take judicial notice of the statute. It is the right, privilege or immunity of Federal origin which must be brought to the attention of the State courts."

We contend that petitioners do not come within the rule as above laid down. Nowhere in the record of this case can it be found where either of the petitioners brought to the attention of the State courts the claim that a decision of the cause contrary to their ideas would deprive either of them of a Federal right, and thereby give them the right to any appeal to this Court.

The decision of the State court is neither in favor of or against any title, right, privilege, or immunity especially set up or claimed by petitioners under the Federal Constitution or any treaty, statute, commission or authority of the United States.

The Carmack amendment required of carriers in interstate commerce to issue a through bill of lading, but the act did not in any way provide for the terms or conditions that must be contained in that bill of lading, except to provide that if the bill of lading did exempt the carrier from loss or damage caused by it, such a stipulation should be void, and to provide further that the carrier should be liable to the holder of the bill of lading for the loss or damage caused by it, notwithstanding an exemption in the bill itself. In pursuance of the mandate of the act, a bill of lading was issued in the instant case. Counsel for petitioners seem to assume that because the bill of lading used in this particular instance happened to be what is commonly known as the Uniform Bill of Lading. This uniform bill of lading is the one which was recommended for adoption in the report of the Interstate Commerce Commission relating to the subject of bills of lading, which report is dated June 27th, 1908, and is to be found in volume 14, Interstate Commerce Commission Reports, at page 346. It will be noted that the Commission did not undertake to prescribe this as a uniform bill of lading, to be used in every case involving an interstate shipment. The form was merely recommended for adoption by the carriers after a conference with the representatives of certain carriers and the shippers of this country. In its report upon the matter, Chairman Knapp said: "Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority."

In the case of Cleveland, C., C. & St. L. R. R. Co. *vs.* Dettlebach, 239 U. S., 588, the Court pointed out the fact that the uniform bill of lading has no binding effect in law, that is, has not the weight of a statute of the United States. It said:

> "The recommendation of the Interstate Commerce Commission for the adoption of a uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight."

We have gone into the question of uniform bills of lading because, as stated, counsel for petitioners seem to have the idea that merely because the uniform bill of lading was used in this instance, the Federal Supreme Court has jurisdiction to construe its terms. We, of course, deny any such contention. We contend that the Federal Supreme Court has no more jurisdiction to construe the terms of a uniform bill of lading as such than it would, as of course, have the right to construe the terms of any other bill of lading. In other words, the uniform bill of lading has no more effect to give this Court jurisdiction than if a special contract to govern the terms of some other particular shipment were the subject-matter of this controversy.

A State court having full jurisdiction has construed a certain clause in that bill of lading, which was issued in this instance, and the Court held that the carrier was liable because his contract, written by him, provided that he would be liable in such a case. It may be said that it was the intent of Congress, in enacting the Carmack amendment, to take over the whole domain of interstate commerce, but we submit that the most that can be said of the statute is, that it intended that a carrier should not by any contract exempt itself from the liability for damage caused by it, and, inferentially, that no State statute or court should deny to the carrier the right to limit its liability to the loss or damage caused by it. The cases that have been before the Court so

far are cases in which State courts have held that a carrier was responsible for loss or damage other than that caused by it, beyond the terms of an express stipulation in the bill of lading, or in which the limit of liability had been fixed by the shipping contract; and had the Supreme Court of Mississippi decided that the carrier was liable for loss or damage not caused by it, notwithstanding an express stipulation in the bill of lading limiting its liability, then we would have to confess that the railroad company had been denied a right guaranteed to it by the Carmack amendment, to wit, the right to limit by contract its liability for the damage caused by it. But such is not the case presented here. It must be borne in mind that unless petitioners have been denied a title, right, privilege, or immunity, guaranteed to them by the Carmack amendment, then this Court will have no jurisdiction.

There is another thing to be considered about the Carmack amendment, and that is, that it does not fix the extent of a carrier's liability in cases involving interstate commerce, but rather fixes a minimum below which the carrier may not exempt itself, and as decided by this Court, it guarantees to the carrier the right to limit its liability by the minimum established by the act. The Carmack amendment does not provide that a carrier cannot and shall not assume any greater liability for loss or damage than that caused by it.

In this instance the carrier issued a bill of lading which contained, among other stipulations, the one the construction of which is the subject-matter of this controversy. Both the trial court and the Supreme Court of Mississippi, in construing the peculiar wording of that particular stipulation, and applying the facts of this case to its meaning, held that the intent of the parties to the contract of carriage was that the carrier should be liable. Is that a denial to the carrier of a title, right, privilege, or immunity arising under the Carmack amendment? We respectfully submit that it is not.

The effect of the decision of the State courts is not that a carrier could not exempt itself from liability under the facts of this case, but it is simply that it has not done so; that is to say, the Supreme Court of Mississippi has not denied to the carrier the right to make a contract which would have limited its liability so as to give it an exemption on the facts presented at the trial, but it has simply held that the contract actually made between the carrier and the shipper provided for liability in this case. It is also manifest that the decision of the Mississippi court does not involve the question of the validity of a stipulation contained in the bill of lading, but involves the construction of one of its stipulations. The State court has not denied the binding force and effect of any term contained in the bill of lading. It has merely construed a stipulation to mean that the petitioners are liable by reason of the very terms of its contract.

We have heretofore discussed the history of the adoption of the uniform bill of lading and its legal effect as related to the jurisdiction of this Court and of the State courts. It is pointed out in petitioners' brief that several State courts have construed the particular stipulation in this uniform bill of lading, and that there exists a diversity of opinion as to what it means. We do not think it is worthy of argument that this fact will suffice to give this Court jurisdiction. As stated, the uniform bill of lading stands in the same position as if it had never been issued by the carriers, and in legal contemplation it is no more than a coincidence that the same contract has come up for construction in the courts of different States.

Recurring, however, to the main point under discussion, that is, whether or not, in truth and in fact, the petitioners have been denied a Federal right, we call the Court's attention to those cases which have been decided by it since the passage of the Carmack amendment, and the opinions of which cases throw light upon the problem.

Adams Express Co. *vs.* Croninger, 226 U. S., 491.

Chicago, B. & Q. Ry. Co. *vs.* Miller, 226 U. S., 512.

Missouri, Kan. & T. Ry. Co. *vs.* Harriman Bros., 227 U. S., 657.
N. O. & N. E. R. R. Co. *vs.* Nat'l Rice Milling Co., 234 U. S., 80.
Boston & Me. R. R. Co. *vs.* Hooker, 233 U. S., 97.
George N. Pierce Co. *vs.* Wells Fargo Co., 236 U. S., 278.
Charleston & W. Car. Ry. Co. *vs.* Varn Ville Fur. Co., 237 U. S., 597.
C., C. & St. L. Ry. Co. *vs.* Dettleback, 239 U. S., 587.
Sou. Ry. Co. *vs.* Prescott, 240 U. S., 632.
N. Y., Phila. & Norfolk Ry. Co. *vs.* Peninsular Produce Exc., 240 U. S., 34.
Atchison, Topeka & S. F. Ry. Co. *vs.* Harold, 241 U. S., 371.
Ga., Fla. & Ala. Co. *vs.* Blish Milling Co., 241 U. S., 190.
Cin., N. O. & T. P. Ry. Co. *vs.* Rankin, 241 U. S., 319.
St. L., I. M. & Sou. Ry. Co. *vs.* Starbird, 243 U. S., 592.
American Exp. Co. *vs.* U. S. Horseshoe Co., 244 U. S., 58.

The Croninger case, *supra*, was the first case after enactment of the Carmack amendment where the question of the validity of a stipulation in a bill of lading limiting the amount which might be recovered in case of loss of goods was decided. The Court held in that case, that such a stipulation was valid and binding, reversing the decision of the State court.

The cases subsequent to the Croninger case, so far as we have been able to determine, have all involved the question of the validity of a stipulation, and in no case has the jurisdiction of this Court been maintained solely to determine the proper construction of a stipulation. We contend that

those cases which have held that various stipulations were binding do not overrule the contention which we make here. There is a very great difference between the validity of a stipulation and its construction. To deny the validity of a stipulation, we submit, would give to the Federal Supreme Court jurisdiction to determine whether or not the same was valid, and that question would be determined in accordance with a uniform rule as contemplated by the Carmack amendment, but to hold that when a State court has construed a stipulation, and that construction does not agree with the views of the losing side, would create jurisdiction, would be going very much further than this Court has yet gone. Otherwise, it would be an idle thing for this Court to declare that a State court has jurisdiction of such a suit. It would be tantamount to holding that in every such case if a party were not satisfied with the decision of the State court, then he could seek redress, in the highest court of the land. Such, we submit, was not the intent of Congress, nor is it the intent of those cases to which we have respectfully called the Court's attention.

Justice Lurton, in his opinion in the case of Missouri, Kansas & Texas Ry. Co. *vs.* Harriman Brothers, *supra*, succinctly stated the rule by which it might be determined whether or not this Court would take jurisdiction of a suit where it was sought to enforce liability against a carrier in interstate commerce. He lays down the rule in this language:

> "The liability sought to be enforced is a liability of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment to the Hepburn act of June 29th, 1906. The validity of any stipulation is such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and as such is withdrawn from the field of State law or legislation. Adams Express Co. *vs.* Croninger, *supra*."

The case at bar involves neither the validity of any stipulation in the bill of lading nor the validity of a limitation upon the liability. Therefore, we submit this case cannot be brought within the true rule.

For the reason stated, we respectfully submit that the petition for the writ of certiorari to the Supreme Court of Mississippi, as prayed for by the petitioners, should be denied.

Respectfully submitted,

JOHN W. CUTRER,
Attorney for Respondents.

We acknowledge service of a copy of the foregoing brief, this the 10th day of December, 1919.

CHARLES N. BURCH,
H. D. MINOR,
C. H. McKAY,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 216.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

NICHOLS & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONERS.

CHARLES N. BURCH,
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CLINTON H. McKAY,
Attorneys for Petitioners.

W. S. HORTON,
Of Counsel.

TOOF-MEMPHIS

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TABLE OF CASES

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STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONERS.

May It Please The Court:

This case is before this Honorable Court on writ of certiorari (heretofore granted) to the Supreme Court of the State of Mississippi to review a judgment of that Court, which affirmed a judgment

originally rendered in the Circuit Court of Coahoma County, Mississippi, in favor of respondents (plaintiffs in the trial court) and against petitioner, The Yazoo & Mississippi Valley R. R. Co., (defendant in the trial court) in the sum of $7,510.12 and costs.

The opinion of the Supreme Court of Mississippi is reported in 120 Miss., 690, 83 Sou. Rep., 5.

STATEMENT OF THE CASE.

The suit was brought in the Circuit Court of Coahoma County, Mississippi, on July 26, 1918, to recover the value of 31 bales of cotton, which had been loaded by plaintiffs for shipment over The Yazoo & Mississippi Valley Railroad, from Alligator, Mississippi, to Memphis, Tennessee.

The cotton was destroyed by fire, without negligence on the part of the Railroad Company, on November 4, 1917, after a bill of lading had been issued by the Railroad Company and after the cotton had been loaded by plaintiffs into a box car on a side track serving a cotton gin, but before the car containing said cotton had been removed from said side track (Rec. p. 1).

Plaintiffs' declaration merely alleged the breach of defendant's duty as a common carrier to deliver said cotton to the consignee at Memphis, Tennessee.

Defendant relied in its defense upon the last paragraph of Section 5 of its bill of lading, reading as follows:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or

vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.*"

(Record, p. 18).

The portion of the bill of lading relied upon by the Railroad Company for exemption from liability is that shown in italics in the above excerpt.

The bill of lading in this case is what is known as the uniform bill of lading, which has the approval of the Interstate Commerce Commission, the same having been recommended by the Interstate Commerce Commission for adoption in the case entitled "In the matter of Bills of Lading," 14 I. C. C., page 346.

This is also the bill of lading referred to in the tariff and classification of the Railroad Company filed with the Interstate Commerce Commission (Rec. p. 65, et seq.)

Plaintiffs shipped their cotton under this uniform bill of lading at a reduced rate, *but* plaintiffs, under the tariff (Rec. p. 66), could have shipped their cotton at a higher rate, and under a bill of lading "limited only as provided by common law

and by the laws of the United States and of several States in so far as they may apply."

The town of Alligator, Mississippi, is a small station on the line of the Yazoo & Mississippi Valley Railroad, at which an agent is maintained, and there is a spur track leading from the main line of the railroad at said station and extending for a distance of about one thousand feet to a cotton gin (Rec. p. 40). This side track was constructed under a contract with one Rainer (Rec. p. 36), and served two cotton gins, and was also at times used for the loading and unloading of general carload freight. The material in this side track belonged to the Railroad Company, but the land upon which the portion of the spur track, where the car was burned, rested, was the private property of another person (Rec. p. 35).

The cotton involved in this case was ginned and prepared for shipment at the cotton gin at the end of said side track and was loaded *by plaintiffs* in a box car from the platform of the cotton gin (Rec. p. 21).

The car was placed at the cotton gin on Saturday, November 3, 1917, and the loading of the car was completed about one o'clock (P.M.) of that day, and the bill of lading was issued therefor by the agent at Alligator about 1:30 P. M., of the same day (Rec. p. 21).

The cotton was destroyed by fire on the following day (Sunday), November 4, 1917, at about four o'clock P. M., by the spreading of a fire originating in the gin, and *before the car had been attached to any engine or train* or in any way moved from said side track, or from the place where it was loaded (Rec. pp. 20-22).

On the trial of said cause in the Circuit Court of Coahoma County defendants relied for exemption from liability on the paragraph in the bill of lading above referred to, in as much as the car containing the cotton *had not been attached to any train.* Plaintiffs denied the validity of said clause in the bill of lading. However, the Supreme Court of Mississippi, in deciding the case, held, in substance, that the clause in the bill of lading above referred to was valid, but the Supreme Court of Mississippi construed said clause *not to be applicable to the instant case*, as the proof showed that the Railroad Company had a regularly appointed agent at Alligator. In other words, the Supreme Court of Mississippi held that there should be read into and interpolated into the last clause (above referred to) the words "at which there is no regularly appointed agent," and that said words "at which there is no regularly appointed agent," which appear in the first clause of the above excerpt from the bill of lading were also a part of and to be read into the second clause of said paragraph of the

bill of lading. The Supreme Court of Mississippi based its opinion (Rec. p. 76), entirely on the said construction of said clause of the bill of lading. This paragraph of the uniform bill of lading has been passed upon by the highest courts of several states and there is a diversity of opinion among the state courts as to the proper meaning and effect of this paragraph of the uniform bill of lading. The Supreme Courts of Mississippi, California and West Virginia hold that the clause above referred to grants exemption from liability *only at non-agency stations;* whereas, the Supreme Court of New York and also the Court of Appeals of New York and the highest courts of New Jersey, Vermont and Arkansas allow exemption from liability (as to loaded cars not yet attached to trains) without regard to whether *the station* is an agency or a non-agency station, as will be shown hereafter.

The question as to whether at agency stations, the last clause of the above paragraph of the uniform bill of lading gives to carriers exemption from liability as to loaded cars for which a bill of lading has been issued, but which have not been attached to trains, is a matter of great importance to shippers and carriers, and the proper construction of said paragraph of the bill of lading can only be authoritatively determined by this Court. Only by a decision of this Court can a uniform construction of said bill of lading be attained, and only

thereby can shippers and carriers be definitely advised as to their rights and liabilities.

SPECIFICATION OF ERRORS.

Your petitioners now aver that the following plain errors were committed by the Supreme Court of Mississippi in rendering the judgment complained of against petitioners:

1. The Supreme Court of Mississippi erred in holding that the clause in the bill of lading aforesaid applied only at stations at which defendant had no regularly appointed agent.

2. The Supreme Court of Mississippi erred in this, that the clause in said bill of lading relied upon by defendant was construed by the Supreme Court of Mississippi not to apply except at stations at which defendant had no regularly appointed agent, contrary to its manifest words and intent.

3. The Supreme Court of Mississippi erred in holding that, under the Act to Regulate Commerce as Amended, the tariffs and bill of lading aforesaid, and the common law rules accepted and applied by the courts of the United States, the defendant was liable for the destruction of said cot-

ton by fire while it remained on the private siding at the gin at which it was loaded, when said fire originated in the gin, without negligence of defendant, and without negligence of defendant in exposing the cotton to the fire, and without negligence of defendant in its attempt to rescue the cotton from the fire, after the fire was discovered.

4. The Supreme Court of Mississippi erred in holding that the trial judge did not err in directing a verdict for plaintiff.

5. The Supreme Court of Mississippi erred in holding that the trial judge did not err in refusing to give defendant's request for an instruction that plaintiffs were entitled to recover the freight charges of $91.44, (which had been subsequently paid), and interest thereon and "no more" (Rec. p. 68).

BRIEF.

The stipulation of the Bill of Lading in question, so far as pertinent here, applies at all stations, whether agency or non-agency stations.

Bers vs. Erie R. R. Co., 163 N. Y. Supp. 114;

Bers vs. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456;

Siebert vs. Erie R. R. Co., 163 N. Y. Supp. 111;

Standard Combed Thread Co. vs. Penn. R. R. Co., 88 N. J. Law 257, 95 Atl. 1002, L. R. A. 1916 C. 606;

Bianchi & Son vs. Montpelier, Etc. R. R. Co., 92 Vt. 319, 104 Atl. 144;

Y. & M. V. R. R. Co. vs. Chickasaw Coop. Co., 141 Ark. 71, 215 S. W. 897.

Contra:

Jolly vs. Atchison, Etc. R. R. Co., 21 Calif. App. 368, 131 Pac. 1057;

McClure vs. Norfolk & Western Ry. Co., 83 W. Va. 473, 98 S. E. 514;

Y. & M. V. R. R. Co. vs. Nichols & Co., 120 Miss. 690, 83 Sou. Rep. 5;

2. The words "private or other sidings," as used in said stipulation, include an industry track built beyond the way lands of the railroad company, upon the application of and under contract with the owner of a public gin, primarily to serve

the gin and its patrons, though the track may be used for other railroad purposes, for the convenience of the railroad company or other shippers.

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ARGUMENT.

As will be seen from the foregoing statement, this case involves the construction, meaning and effect of the following paragraph in the uniform bill of lading:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.*"
>
> (Record, p. 19).

We shall attempt to show that the Supreme Court of Mississippi has placed a totally unnatural and erroneous construction on this paragraph. The Supreme Court of Mississippi, in its opinion, found that the cotton was destroyed by fire without negligence on the part of the railroad company, and bases its conclusion of liability of the defendant railroad company entirely on the construction which it has given to the last clause of the above paragraph. It is our purpose to show that the paragraph does not mean and cannot mean what the Mississippi Supreme Court has declared that it does mean.

It is true that the word "property" in the quoted paragraph of the bill of lading is the subject of the verb "shall be" in both the first and second clauses; but the first and second clauses refer to totally dissimilar and distinct conditions. It is our contention that the keynote to the proper construction of this paragraph is to be found in the word "private" (as used in the second clause). In other words, it is our contention that the word "private," as used in the second clause and as applicable to the words "wharves or landings," is thereby intended to differentiate the wharves or landings referred to in the first clause. That is, it is our contention that the first clause refers to a *public* station, wharf or landing; and that the second clause refers to private wharves or landings and private sidings, and also to all other sidings, whether the same be quasi-private or public, or quasi-public, *but not including* those public side tracks which are *immediately adjacent to* and serve a public *station*, and from which freight is unloaded into a public depot or loaded from a public depot into cars on such public sidings. In other words, the words "private or other sidings" do not include *side tracks, team tracks,* or *house tracks* immediately adjacent to a freight house, that is, those tracks which *are an integral part* of the public freight house facilities. The last mentioned sidings are included in the term "station" in the first

clause, as such tracks are as much a part of the station as the station platform. To make the matter clearer, it appears from this record that there is what is called a house track which is immediately parallel with and adjacent to the freight depot and platforms (Rec. p. 12) (Blueprint, p. 37). Of course, a railroad could not properly provide that it would not be responsible for goods loaded into a car (when such car was standing on a public side track immediately adjacent to the freight house) until such car had been attached to a train.

Furthermore, at a station *where an agent is maintained*, the railroad becomes responsible as soon as goods are deposited on the freight house floor or platform, and bill of lading is issued, or if not deposited on the freight house floor, just as soon as the goods are placed in a car which is on a track *which serves the freight house*, and bill of lading is issued.

We insist, therefore, that the whole paragraph, according to its true intent and meaning, should be construed as if it read as follows:

"Property destined to or taken from a *public* station, wharf, or landing, at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings (*said other*

sidings not including those sidings which are an integral part of public freight house facilities) *private wharves,* or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

The words in italics are inserted by the writer of this brief. The rest of the language is just the same as it appears in the bill of lading.

Looking now to the first clause of this paragraph it means that if a carrier has a public station, wharf or landing, at which the carrier does not maintain a regularly appointed agent, then in such event, the carrier shall be responsible until inbound goods are unloaded from the cars, and as soon as outbound goods are loaded into cars.

The second clause means that when a party receives or delivers goods not at a regular freight house, or not at a track serving the regular freight house, but on a private or other siding, then in such event the liability of the carrier as a common carrier shall not begin until (as to outbound freight), the loaded cars are attached to trains, and as to inbound freight the common carrier's liability shall cease when cars are detached from trains.

We are concerned here with outbound freight and will give some further attention to that feature

Looking then to the feature of outbound freight, we insist that where the shipper loads his own freight, as is the case here, and loads it at a *public* station, wharf, or landing, at which there is no regularly appointed agent, the liability of the common carrier under the first clause attaches as soon as the goods are loaded into a car; and we further insist that when a shipper *does not choose* to load his freight at a regular public freight house, but, on the other hand, *chooses to load his freight at a private wharf* or private landing or on any kind of a side track (which does not serve a public freight house), then in such event the liability of the common carrier does not attach until the car containing such goods is attached to a train.

It is well known that a railroad agent works in the freight house or station building, and it is entirely reasonable to expect him to supervise and take care of all property in the station building and all property on tracks immediately adjacent to the station building, which are an integral part of station building facilities. But it is not reasonable to expect the station agent to have supervision of and to take care of property in cars on side tracks which are not immediately at a station building, but which are some distance therefrom, and particularly when the side track is located on land not belonging to the railroad company. For instance, in every large city there is an agent at the

freight house for the receipt of outbound freight, and this agent, either personally or through his assistants, is in a position to see and to take care of the freight delivered in his freight house for outbound shipment, or loaded into cars which are on tracks immediately adjacent to the freight house, but such agent could not be expected to see and take care of cars loaded on all the private sidings of all the warehouses and industries of such city, or even on public sidings which are not immediately at and adjacent to his freight house. Of course, the Court judicially knows that a large part of the tonnage of the country is loaded into cars which are on tracks quite remote from the place of business of the local station or depot agent. As to such cars the railroad company has a right to insist that its liability as a common carrier shall not begin until such cars are attached to trains. *No one is required to load his freight on a private side track or a public side track remote from the regular depot.* A shipper has the right if he chooses to deliver his freight at *the regular freight depot* or to load it into cars placed immediately adjacent to the regular freight depot. If the shipper, *for his own convenience*, elects to load his cars at some other point, then, certainly the carrier has a right to say that, in such event, the carrier's liability as a common carrier or insurer, shall not begin until the cars are attached to a train—in other words, until

the cars are in the actual, as distinguished from the constructive possession of the carrier.

This brings us to a discussion as to the true character of the track upon which the cotton in this case was standing when destroyed by fire.

CHARACTER OF THE SIDE TRACK.

The record shows that there is a station or depot at Alligator, at which the agent of the carrier transacts business. The record further shows that there is a public side track, known as the house track, immediately adjacent to the station or depot. The car of cotton involved in this case was not loaded on this house track. If it had been loaded on this house track we would not deny liability.

The track involved here begins at a point about sixty feet south of the depot platform and extends in a southeasterly direction on a curve for a distance of one thousand feet to the gin, at which the cotton involved in this case was loaded. This track was built by the railroad company under a contract between the railroad company and one J. C. Rainer (Record p. 36). The contract provides that whereas J. C. Rainer was engaged in business at Alligator and "in order to facilitate the carrying on of *his* business, desires to have a spur or side track constructed, connecting with one of the tracks of

the party of the first part (the railroad company)," it is therefore agreed that Rainer shall furnish to the railroad company the ground needed for the construction of the side track, so far as the same should extend beyond the right of way and grounds of the railroad.

It was further agreed that the railroad company should construct the track and furnish all the track material. It was also agreed that the railroad company should be the owner of all the track material and that the track material should remain personalty and should not become a part of the realty, and that the railroad company should have sole control of the side track and that the railroad company should have the right to take it up at any time in its discretion on thirty days' notice to Rainer, and it was further agreed that the agreement was to be binding on both Rainer and the railroad company and their successors.

From this contract and from the record it is clear that the railroad company did not own the land (beyond its right of way) on which the track was built. It merely used only so much of the land as was necessary for the construction of the track beyond the right of way line. Rainer and his successors in title owned and still own the land on which the track is laid immediately adjacent to the cotton gin.

It will be seen from this contract that the track was built at the instance of Rainer "to facilitate the carrying on of *his* business"—his business being the operating of a gin for hire. Rainer, before the bringing of this suit, had sold his gin to one Parks and had built another gin on this same side track, somewhat nearer to the station. It is true that this track while serving these gins was also used to a considerable extent by the railroad company for the loading and unloading of a large portion of the carload freight handled at Alligator.

In the opinion of the Supreme Court of Mississippi, it is said:

> "There is evidence tending to prove that the Parks gin track and the railway company's house track along the depot furnished the facilities for handling incoming and outgoing freight, and that between 50 and 75 per cent. of all carload shipments were handled on the side track leading by Parks' gin; that the shipping public used the gin track, and to this end a track scale was placed on this gin track."

This statement of the Supreme Court of Mississippi is to be read in the light of the uncontradicted fact that the *track scale* was not installed by the railroad company, but was installed by Rainer, Parks and Kline. The record on this is as follows:

"Mr. Cutrer: One original question: Mr.

Rainer, in reference to this side track, I omitted to ask you whether or not the railroad company had put in a track scale on that track?

A. The railroad company has not put in a track scale. Mr. Parks and Mr. Kline and myself have put in the track scale, and it is used by the town in the way of carload stuff that come in there. We weigh out all our seed, and weigh in carloads of hay and grain.

Q. Is that, or not, the only track scale used by the railroad company at Alligator?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not the railroad company has continuously, since that scale was put in there, used it in the settlement of freight coming in and going out?

A. I don't—I could not say. My bookkeeper has been doing that.

Q. I will ask you to state whether or not it has been used in connection with the business of the railroad company at that point?

A. They make a switching charge, and weighing the cars.

Mr. McKay: And that scale belongs to Mr. Parks and you and Mr. Kline?

A. That was put in at our expense. The railroad did the work; but we paid the railroad for it." (Rec. pp. 37-38).

The car in which the cotton was loaded in this case was placed by the railroad company on the

track opposite the gin at the request of the shipper (Rec. pp. 20-21). The shipper did not request the car to be placed on the house track immediately in front of the freight station. This was evidently for the shipper's convenience, as it was apparently easier for the shipper to load the cotton at the gin than to haul it from the gin to the freight station platform, or load it into a car on the house track. The loading of the car was done by the shipper (Record p. 13).

The agent of the railroad company issued a bill of lading upon the statement of the shipper that the car had been loaded (Rec. p. 14).

The plaintiffs, having elected to do their own loading at the cotton gin, and not haul the cotton to the freight house, thereby became bound by the stipulation in the bill of lading, which provides, in substance, that the liability of the railroad company did not begin until the car containing the cotton should be attached to a train. This was entirely reasonable, as it could not be expected that the company would assume liability as an insurer for a car of cotton only constructively in its possession, when it was not located immediately adjacent to the freight house, where the agent could watch and check the loading of the cotton and take care of it, but which was located over one thousand feet away on private property at the end of a side track adjacent to the cotton gin.

THE JUDICIAL DECISIONS CONSTRUING THE CLAUSE OF THE BILL OF LADING IN QUESTION ARE CONFLICTING.

In the case of Siebert v. Erie R. R., 163 N. Y. Supp., 111, a car was robbed. Said the court:

> "The loss in the present case occurred while the silver was in the car upon a siding adjacent to the works of Ledoux & Co., and before the said car had been attached to a train."

The report of the case shows that the agent of the railroad company "went into the car, counted the bags and sealed the car." In other words, while the court does not stress the fact, yet it does appear from the report of the case that the car was loaded on a side track and that the railroad company had an agent at the station (Bergen Junction) and that the agent went into the car, counted the bags of silver and sealed the car.

The identical paragraph in the bill of lading was relied on by defendant, as in the instant case. The New York Court, without going into any elaborate discussion of the matter, held that as the car had not been attached to a train the defendant had a complete defense to the action.

In the above case it does not appear what the distance was from the station (Bergen Junction)

to the works of Ledoux & Co., where the car was loaded. But the whole inference from the opinion is that the car was loaded on a side track used by Ledoux & Co., and not on a side track which was an integral part of the freight house or depot facilities.

In the case of Bers v. Erie Railroad Company, 163 N. Y. Supp., 114, the same paragraph of the uniform bill of lading was under construction. The merchandise was loaded at Passaic, New Jersey, "upon a siding in front of the shipper's warehouse." As to the character of the side track the New York Supreme Court said:

> "The character of this siding bears an important part in the consideration of the question at issue. It was located wholly upon defendant's right of way, and had been constructed or leased to and was maintained by defendant. It ran parallel with the main tracks, and was about one mile in length, being closed at each end by a bulkhead or bumper. It was connected with the main track by two switches. Along this siding and adjacent thereto were warehouses used by firms or corporations having frequent occasion to ship or receive freight over defendant's road. In front of the warehouse of Chirichello & Sons, and between it and the siding, was a loading platform, which was the property of said firm. *About* 140 *feet* west

of this warehouse was the freight house of defendant.

The car upon which the goods were loaded had been placed by defendant on the siding immediately in front of the shippers' warehouse on the morning of December 14, 1914, and its loading by the shippers had been concluded at about half past three in the afternoon of the same day. The shippers then made out a bill of lading and took it to the freight house, where defendant's representatives signed it and sent a man to seal the car."

The car was broken into during the night and a portion of the merchandise stolen.

It will be seen, therefore, that the siding involved in this case was somewhat similar to the siding in the instant case, being used by several industries, and the railroad also used same for its own purposes, "for the storage of cars and for making up and unmaking trains." 163 N. Y. Supp., 116. The main question discussed in the opinion of the court is the meaning of the words "private or other siding." The court concluded that while the siding was not a private siding, it was within the meaning of the term "or other sidings" and that as the car had not been attached to a train there was no liability. Said the Court:

"If we seek for the reason for the condition, we are confirmed in the view that it applies to

> all sidings, both public and private. The object and purpose of the condition is to define when the carrier's liability for lost property loaded on cars shall begin and shall terminate. The meaning and intent of the stipulation, which is a term of the contract of carriage, is that liability for such property shall begin when the car is removed from the siding and attached to a train, and shall terminate when it is detached from the train and placed on a siding."

As will be seen from the above decision there was a regularly appointed agent at Passaic, New Jersey. This fact did not prevent the court from holding that there was no liability.

The case just discussed afterwards went to the Court of Appeals of New York. (Bers v. Erie Railroad Co., 225 N. Y., 543; 122 N. E. Rep. (N. Y.), 456). The judgment was affirmed. The Court of Appeals said:

> "It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight station and yards. It was not a part of the*

railroad terminal or freight station. It was separate therefrom as effectively *as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto.* It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of private ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

In the case of Standard Combed Thread Company v. Pa. R. R. Co., 88 N. J. Law, 257; 95 Atl. Rep., 1002; L. R. A. 1916 C, 606, the same paragraph of the bill of lading was construed. In that case the court said:

"Defendant maintained what is called a 'public siding' near plaintiff's factory, and was accustomed to place cars thereon for the convenience of plaintiff and other shippers in loading. The station of defendant company was *one-half mile away*, and the custom was for plaintiff to telephone for a car when needed, *to defendant's freight agent* at the station, and

a car would be placed, and the shipper allowed forty-eight hours to load it."

And the court further said:

"But assuming a delivery, still, under the terms of defendant's uniform bill of lading, the goods remained at the risk of the shipper. The 'Carmack amendment,' which is part of section 20 of the Interstate Commerce Act as amended by the Hepburn Act of June 29, 1906, (34 Stat. at L. 584, Chap. 3591, Comp. Stat. 1913, Sec. 8563, quoted in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148), requires the issue by carriers of a bill of lading. Under the act, and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading; and, in the absence of a disclaimer by the shipper and the acceptance of a 10 per cent. higher rate, the terms of the uniform bill of lading are declared applicable. Such a bill of lading was submitted, approved and published. It contained the clause quoted above. In International Watch Co. v. Delaware, L. & W. R. Co., 80 N. J. L. 553, 78 Atl. 49, affirmed in 82 N. J. L. 528, 82 Atl. 730, on the opinion delivered in the Supreme Court, it was held (page 556 of 80 N. J. L.) that 'where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the company

to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading.'

"The clause in question, then, was binding on both parties, and it remains to ascertain whether the siding in question was a 'private or other siding.' It was not a private siding. The trial court held the view that a public siding was not in the intendment of the clause, an 'other' siding. We do not share the view. If sidings are to be classified into private and other sidings, the other sidings would necessarily be other than private, and the logical alternative to 'private' is 'public.'

"On the facts stipulated, the defendant was entitled to judgment."

In the case of Bianchi & Son v. Montpelier & W. R. Co. 92 Vt. 319, 104 Atl. Rep. 144, the same clause of the bill of lading was construed. In that case it appeared that there was a shipment of a granite monument from Barre, Vermont, to St. Louis, Mo. The car containing the monument was delivered upon the "switch" of one Tieman. As to the switch the court said:

"The L. H. Tieman mentioned, lived at St. Louis, and had had the switch in question built by the Missouri Pacific Railroad for his convenience, it being understood that he should be responsbile for the freight charges on all

shipments placed on that switch. The switch or siding named abutted on Tieman's land, and no one except Tieman and the railroad company could have goods placed thereon without the former's consent."

The question involved was the liability of the railroad as an insurer after the placing of the car on Tieman's switch. Said the court further:

"This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented thereto and agreed to be bound by it. Davis v. Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Leavens v. American Express Co., 86 Vt. 342, 85 Atl. 557, Am. Cas. 1915 C, 1188.

"When the car containing the monument was delivered on the Tieman switch specified, and was detached from the train, and the consignees were given a reasonable opportunity to inspect the monument and take it away, the responsibility of the carrier, as such, ceased."

On the facts the court also held the railroad company not liable as a warehouseman.

In Y. & M. V. R. R. Co. v. Chickasaw Cooperage Co., 141 Ark. 71, 215 S. W. 897, the clause of the bill of lading in question was held to grant exemption from liability even at an agency station until

the loaded car had been attached to a train. In that case the car was loaded at Clarksdale, Miss., where the Railroad Company had an agent, but on a side track or spur leading to the lumber yard of the shipper. In holding that the stipulation was valid and that it operated to postpone the carrier's liability as an insurer until the car had been attached to a train, the court said:

> "This contract does not undertake to limit the Railroad Company's liability as a common carrier; it merely defines the circumstances under which delivery for shipment and acceptance by the Railroad Company shall be understood as having taken place between the parties. The liability of the Railroad Company, under the Interstate Commerce Act, attaches as soon as the goods are delivered to the carrier for immediate shipment and are accepted by it. By the clause in question the parties undertook to agree when the delivery and acceptance were complete, and the meaning and intent of the clause in question was that the delivery for shipment and acceptance should be complete when the car was removed from the siding and attached to a train. This was a valid agreement under the principles of law decided in St. Louis, I. M. & S. R. Co. vs. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. Rep. 99."

It will be noted that in the decisions in which exemption from liability has been held to apply to

loaded cars which have not been attached to trains, the courts of New York, New Jersey, Vermont and Arkansas did not discuss whether the words "at which there is no regularly appointed agent" were a part of the clause relied on, but the facts showed that in each instance there was a regularly appointed agent at the "station" or "freight house."

The gist of these opinions is that even though there is an agent *at a public railroad freight house or station,* the liability of the carrier as to cars loaded on side tracks (not part of the freight house facilities) does not begin until such cars are attached to trains, regardless of whether the side track be absolutely private or absolutely public or quasi-private or quasi-public. In order that the liability of a common carrier may attach before cars loaded on side tracks are attached to trains, it must appear that the side track on which the loading is done is in reality the *house track* of the station or freight house or an *integral part* of the station building and immediate station facilities, over which the agent at the station could reasonably be expected to exercise supervision and care. The loading in this case was done by the shipper on private property at a gin owned by a third party and a thousand feet distant from the station. Under these facts we insist that the exemption granted by the last clause applies with full force.

While the construction of the meaning of the sentence from a grammatical standpoint is not necessarily conclusive, yet it is persuasive, and construing the paragraph of the bill of lading from a grammatical standpoint it seems clear that the words "at which there is no regularly appointed agent" should not be brought forward into the second clause.

But even bringing these words forward into the second clause does not lead to the effect given to the clause by the Supreme Court of Mississippi. *There was no regularly appointed agent of the railroad at the cotton gin.* There was a regularly appointed agent at the freight house whom the law would expect to have custody and control of goods in the freight house and of goods on house tracks or side tracks immediately adjacent to the freight house, that is, such tracks as were a part of the freight house facilities. But the law would not expect an agent to exercise supervision and care over a car on private property loaded at a gin of a third party and a thousand feet away from the freight house. Indeed, the Court judicially knows that in large terminals side tracks, such as the one in question, are frequently many miles away from the freight station.

THE EXEMPTION FROM LIABILITY APPLIES TO ALL CARS LOADED ON ANY KIND OF A SIDING WHICH IS NOT AN INTEGRAL PART OF STATION OR FREIGHT HOUSE FACILITIES.

In Bers v. Erie R. R. Co., 122 N. E. (N. Y.) 456, the Court of Appeals of New York had under consideration a car loaded on a side track *only* 140 *feet* from the freight house of the railroad company. The track was owned entirely by the railroad company and was entirely on property of the railroad company and was used by warehouses abutting on said side track, and also by the railroad company for its own purposes. In that case the Court of Appeals of New York said:

> "It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight station and yards.* It was not a part of the railroad terminal or freight station. It was separated therefrom as effectively as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of pri-

> vate ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

The Supreme Court of New York, in the same case, (163 N. Y. Supp. 116), said of the same track that it was used for the storage of cars and for "making up and unmaking trains;" that is for general railroad purposes.

The decision of the Court of Appeals of New York, we submit, gives the correct construction and effect to this clause of the bill of lading. In other words, it is entirely reasonable that a railroad company's liability as a common carrier should begin immediately on the issue of a bill of lading as to goods delivered at its freight house or on its freight house platform or into cars which are standing on side tracks immediately adjacent to the freight house and which are an integral part of the freight house facilities. But it is not reasonable to expect, when a shipper, instead of delivering his cotton at the freight house, or the freight house platform, or into a car immediately adjacent to the freight house, elects instead to deliver his cotton on a side track on private property at a cotton gin, that liability should begin until the car is attached to a

train. That is, the clause is to be construed in the light of common experience and reason and in the light of the well-known practice of railroads.

It appears from the plaintiff's proof in this case that there was a cotton platform at the station upon which cotton could be delivered for shipment (Rec. p. 24). And it appears that the plaintiffs, in some instances, had hauled cotton to the station platform for shipment (Rec. p. 28). This cotton platform of the railroad has a capacity of from fifty to one hundred bales (Rec. pp. 24, 44). *The plaintiffs, having elected to load their cotton on private property at a cotton gin where the agent of the carrier could not be expected to give it care and supervision, instead of loading their cotton onto the cotton platform at the station where the agent would be expected to give it care and supervision,* must assume liability for the cotton and should assume liability for the cotton until the car containing same became attached to a train.

It must not be overlooked that the track was constructed as an industrial track for Mr. Rainer, the owner of the land upon which parts of the track rest. Mr. Rainer, a witness for the plaintiffs, testified:

> "Q. Mr. Rainer, do I understand you to say that before this track was installed, or con-

structed, you made application to the railroad company for an industrial track; did you?

A. I did.

Q. What was your idea in doing that?

A. I wanted to erect a gin there, and I wanted to put my cotton platform and seed house on the track.

Q. You wanted it there for your convenience, and convenience of your patrons?

A. Yes, sir.

Q. And they did construct the track on your application?

A. Yes, sir.

Q. And the condition on which the track was constructed is embodied in this written contract that you have testified to?

A. Yes" (Rec. p. 35).

Mr. Rainer also said:

"A. Whenever I requested the agent to set a car on that track, the agent or conductor would have it placed where I wanted it, or anybody else getting a car, lots of friends would make a request that they put them out on that track, the agent or conductor to switch them out on there" (Rec. p. 34).

Mr. Rainer also testified:

> "Q. Well, when the railroad company undertook to put a track in there, you gave them the right of way?
>
> A. Well, I didn't give them the land. I gave them permission to put it on my land; but I didn't deed them the land" (Rec. p. 33).

Certainly, under these conditions, the car of cotton loaded at the gin on the land of a third person could not reasonably be expected to be at the risk of the railroad company until the railroad company took actual possession of same by attaching the car to a train, and the clause in the bill of lading so providing is therefore entirely reasonable and valid and should be given its natural meaning and effect.

THE DECISIONS CONTRA.

The decisions contra are the decision in this case, Y. & M. V. R. R. Co. v. Nichols & Company, 120 Miss. 690, 83 Sou. Rep. 5, (Rec. p. 76), and the cases of Jolly v. Atchison, Topeka & Santa Fe R. R. 21 Calif. Appeals, 368, 131 Pac. 1057, and McClure v. Norfolk & Western Railway Company, 83 W. Va. 473, 98 Southeastern, 514.

We respectfully submit that these opposing authorities just cited are based upon the erroneous proposition that the last clause of the bill of lading in question, which exempts the carrier from liability until cars loaded on private or other sidings are attached to trains, has no application in any city, town or terminal where the railroad maintains an agent, notwithstanding the siding, where the car is loaded, is not a part of the freight house facilities and may be located miles away from the freight house. The construction given by these courts would make common carrier liability attach to a car loaded in the City of Chicago on a private siding ten miles from the freight house, and merely for the reason that there is a regularly appointed agent at the freight house. We submit that this is a complete "non sequitur," and a most strained and unnatural construction, and one that cannot be upheld on the accepted rules of construction of contracts read in the light of the facts of this case and the known practices of railroad companies in handling carload freight.

There were other questions raised in the case before the Supreme Court of Mississippi, but it is unnecessary to discuss them, as the Supreme Court of Mississippi has based its decision entirely upon the construction and effect of the bill of lading and

held upon that basis that the trial judge was correct in directing a verdict for plaintiffs.

We respectfully insist that the case should be reversed and remanded for a new trial.

Respectfully submitted,

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In the Supreme Court of the United States

No. 655 216

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and
THE UNITED STATES FIDELITY AND GUARANTY COMPANY
Petitioners

versus

NICHOLS & COMPANY
Respondents

Statement of Facts and Brief for Respondents

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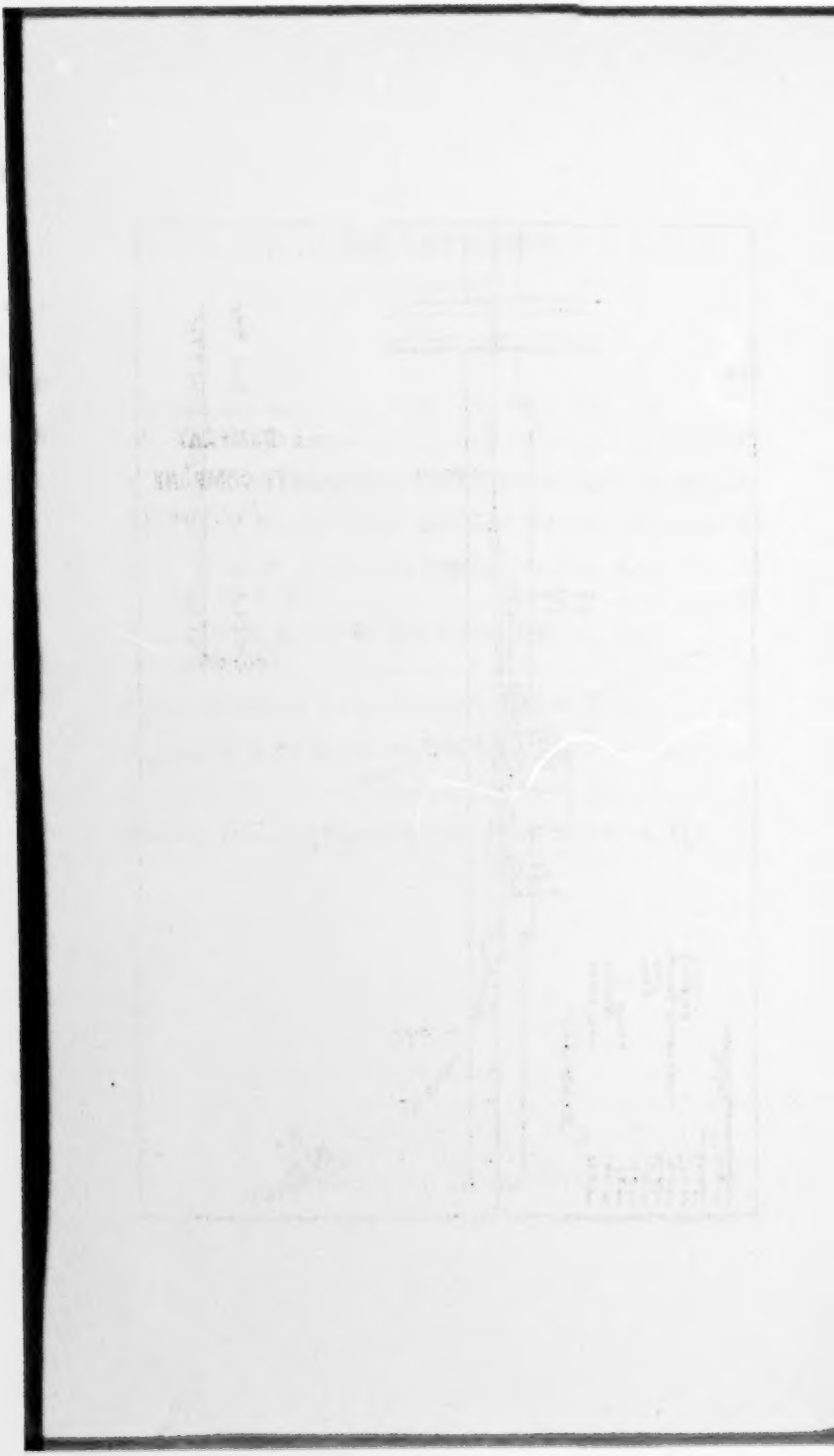

In the Supreme Court of the United States

No. 655

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and THE UNITED STATES FIDELITY AND GUARANTY COMPANY
Petitioners

versus

NICHOLS & COMPANY
Respondents

BRIEF FOR RESPONDENTS

STATEMENT OF FACTS

The respondents, Nichols & Company, desiring to ship their cotton from Alligator, Mississippi, to Memphis, Tennessee, so informed the station agent of the Yazoo & Mississippi Valley Railroad Company, at Alligator, Mississippi. The station agent placed a car at their disposal, placing same upon a spur, which, for convenience sake we shall call the "proposed" spur. The respondents loaded their cotton into this car and received from the agent a bill of lading. The car was then in the hands of and in the complete control of the railroad company.

The "proposed" spur was a part of the terminal facilities and freight yards of the railroad company, as found by the trial court, and the Supreme Court of Mississippi, at that place, the public regarded it as such, and the record shows that ninety per cent of the carload freight of Alligator, was handled on the "proposed" spur. An inspection of the map made by agreement, a part of the record, prepared by the railroad company, a reduced reproduction whereof is inserted herein, will show that the "proposed" spur is within sixty feet of the depot, at which three employees of the railroad are stationed. It is also significant to note that the map prepared by the railroad company call the alleged "private siding" the "proposed" spur.

The map shows that the only other track provided for loading and unloading all classes of freight other than car load freight, also was a "spur" nine hundred and fifteen feet long, of which less than two hundred feet are available to the public, due to the fact that buildings, crossings, and private platforms and houses occupy the rest. Its location, too, was inconvenient for loading and unloading car load lots of freight.

That it was a "spur," with a blind end, instead of a "siding" regularly connected with the main line track at each end, added to its insufficiency as one of the facilities for the handling of the business of the railroad company, and increased the necessity for other facilities.

It is evident, therefore, that there was an absolute need of more trackage for freight yard and terminal facilities, in order to handle the full amount of the carload traffic of the community, which consisted of cars of lumber, coal, grain, drygoods and other commodities

required by the community. Such were placed uniformly upon the "proposed" spur, without suggestion from consignees.

Furthermore, the only set of track scales in the town was placed on the "proposed" spur, and was used by the railroad company in all its weighing.

After the cotton had been loaded in the car, and bill of lading issued by the railroad company, the same caught fire and was destroyed.

Wherefore respondents brought this action and recovered judgment. An appeal was prosecuted by the railroad company from this judgment, and the judgment was affirmed by the Supreme Court of Mississippi. Whence this petition for the review of that judgment is sought to be maintained.

BRIEF AND ARGUMENT

CONSTRUCTION OF THE CONTRACT

Petitioners in this case rely for a reversal of this case, because of the construction by the Supreme Court of Mississippi placed upon the bill of lading mentioned as issued by the Yazoo & Mississippi Valley Railroad Company, to the respondents, Nichols & Company. This bil lof lading provided, among other things, the following:

"Property destined to or taken from a station * * * at which there is no regularly appointed agent shall be entirely at the risk of owner after unloaded from cars * * * and when received from or delivered on private or

other sidings * * * shall be at owner's risk until the cars are attached to and after they are detached from trains."

In construing this provision of the bill of lading, the Supreme Court of Mississippi said:

"Whatever differences may exist as to the construction to be placed upon the quoted provisions in the bill of lading, we prefer and adopt as the more reasonable view, the construction which the Supreme Courts of California and West Virginia have placed upon this paragraph in the uniform bill of lading. Jolly vs. A. T. & S. F. Ry. Co., 21 Cal. Ap. 308, 131 Pac. 1057; McClure vs. Norfolk & Western Ry. Co. (W. Va.) 98 S. E. 514. Under this view, the paragraph should be construed as a whole, and the phrase 'at which there is no regularly appointed agent' should be held to qualify the last clause, as well as the first clause of the provision. If there is a reasonable doubt as to the true interpretation to be given this clause of the bill of lading, we are justified in construing the contract more strongly against the defendant. It will be observed that the paragraph is written and must be read as a whole, and that the word 'property,' the first word used, is the subject of the entire paragraph; that the so called 'last clause' of the provision is separated from the first by a comma, and by proper grammatical construction, this last clause in reference to property received or delivered on private or other sidings * * * has application only to those places where there is no regularly appointed agent. As well stated by the Supreme Court of West Virginia in the McClure case, the term 'private or other siding,' in the last clause, necessarily means private or other sidings because all railroad sidings fall in one

or the other class. The word "private" is contra-distinguished from "public."

See reported case, 126 Mississippi Reports, 690.

We respectfully submit that the Mississippi Supreme Court has correctly construed the contract of the carrier, no matter in what light the contract may be considered.

As to the interpretation of the phrase "private or other sidings," we submit that it is a question of *ejusdem generis*, and that the expression "other sidings" means other *such* sidings, that is, sidings private in their nature, whether wholly or partially private, as being the subject of sole or partial private ownership, use or enjoyment, and whether used and enjoyed by one or many, not embracing in the right to the use and enjoyment, the general public, or the public at large.

But certainly it cannot be contended that the "proposed" spur is a siding of any such nature. From an inspection of the record, it is clear that the findings of the trial court, and the findings of the Supreme Court of Mississippi, are correct. Uninterrupted use of this "proposed" spur by the railroad company and by shippers generally, embracing the public at large, was essential to the prompt and efficient handling of incoming and outgoing carload lots of freight. Its location was right at the depot and it was used continuously by the railroad company as a part of its freight yards and depot facilities.

It will be observed from the map made by the railroad company, that the only other track for the hand-

ling of freight, that one above referred to as passing along near the depot, and the Darr lumber platform, and the cotton seed house of Leslie, is denominated a "spur," and that the track upon which the car load of cotton was destroyed, was denominated a "proposed" *spur*, so that in the eyes of the railroad company, they were both one and the same as to uses, as well as one in nomenclature. This "proposed" spur when reduced to reality, serves the same purposes as were served by the "spur" in existence when it was constructed.

It does not appear to us that the effect of any of the decisions relied upon by petitioners, can serve to change in legal contemplation, the character of this "proposed" spur from what it was and is, to one clearly embraced within the limited meaning of the term "private," or partially or qualifiedly, private, in any respect.

Discussions of this phrase "private or other sidings," which would seem to be valuable to the court in deciding this question raised upon the bill of lading, are found in the following cases:

The case of Bers et al vs. Erie R. Co., 163 N. Y. S. 114, has a dissenting opinion concurred in by two Justices, which presents a most reasonable analysis of the questions presented in that case. In discussing the effect of the terms of a similar bill of lading, with reference to "private or other sidings," the Court said:

> "In the view I take of the evidence it is altogether immaterial whether the car was or was not attached to a train before the larceny of the property. The track upon which the car was loaded was neither a 'private or other siding' within the meaning of the bill of lading. It was merely a

part of defendant's terminal and freight yard. It was so placed with reference to the main tracks that it could be used for general switching purposes, car storage, or for the receipt and delivery of freight to the seventeen various business concerns adjacent to the track in the immediate vicinity of the freight house. In determining the rights and liabilities of the parties under this interstate shipment, we must be governed by the acts of Congress, bills of lading, and common-law rules as accepted and applied in federal tribunals. Cincinnati & Texas Pac. Ry. vs. Rankin, 241 U. S. 319, 36 Sup. Ct. 556, 60 L. Ed. 1022.

The track in question is not a private siding within the meaning of the bill of lading. In railroad law, as interrupted by federal tribunals, private sidings are those 'outside the carrier's right of way, yard, and terminals, and of which the railroad does not own either the rails, ties, roadbed, or right of way.' Conference Ruling 121 of the Interstate Commerce Commission. In the case of Associated Jobbers of Los Angeles, 18 I. C. C. 310, the Commission refers to a 'private' siding as 'one not owned by the railroad and which is not a part of the railroad's own terminals.' In the case of N. C. Y. & H. R. R. Co. vs. General El. Co., 219 N Y. 227, 114 N. E. 115, Judge Cardozo uses the following language:

'Private sidings, owned and maintade by shippers, do not constitute the right of way, and the use that the carrier may be compelled to make of them is subordinate and incidental to the fulfillment of its primary function of carriage along its route'

See, also, Los Angeles Switching Case, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319.

Nor is the track in question to be included in the term 'other sidings.' These words do not comprehend within their meaning *all* sidings other than privae aidings; for instance, they would not include a siding directly in front of defendant's freight station in charge of an agent. They doubtless refer to those sidings which, like private sidings, are not owned and controlled by the railroad. They would include a public siding, since a public siding cannot be said to be owned by the railway.

Thus construed, this bill of lading absolves the defendant from liability for loss of property at its own station, wharf, or landing, where it has no regularly appointed agent after the property has been unloaded from cars or vessels, and, in case of shipments at those places, until loaded into cars or vessels; and when the property is received from or delivered at wharves and landings not owned by the defendant, it is not liable for loss until the cars are attached to a train, and in case of delivery it is not liable after they are detached therefrom; and, finally where the property is placed in cars on private side tracks, or on other tracks over which the railroad has no control, the property is at the owner's risk until the car is attached to a train, or, in case of delivery, the defendant is not liable after the car is detached therefrom.

Even if we deem defendant's track to be an industrial spur or siding, because it serves more or less exclusively several private industrie adjacesnt to it, it is not a 'private or other siding' within the meaning of the bill of lading. Referring to industrial spurs and sidings, the Interstate Commerce Commission has said in the case of Associated Jobber Case, 18 I. C. C. p. 312:

'. . . These industry spur tracks are not private, in that the carrier may use them for pur-

poses of his own—as for storage of cars, as loads to other industries, and sometimes for public delivery. * * * Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a special, and generally in practice an exclusive, railroad depot for the carload freight of a particular shipper. * * * We are fully convinced * * * that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers.'

The Commission accordingly found that the contract of carriage was not performed until there was a delivery by the carrier at the industry on the spur track. The Tap Line Cases, 234 U. S. 1, 25, 34 Sup. Ct. 741, 58 L. ed. 1185."

It will be noted that the dissenting Judges in that case made the same point that Judge Pound made in the opinion of the Court when this case was appealed to the Highest Appellate Court of New York, that is, he interprets the words "other sidings" to mean not all sidings which are not private, but only those sidings which in their nature are like private sidings, and he maintained and construed the bill of lading to mean this, that the terms of the bill of lading could not possibly absolve a railroad company of its liability as an insurer for all goods received on all side tracks.

The case of Chas. Bianchi & Sons vs. Montpelier & W. R. R. Co., 104 Atl. 144, was an action brought by the plaintiffs, Chas. Bianchi & Sons, as consignees of certain freight for the non-delivery of said freight. It seems that the consignment of freight was billed to be delivered on a certain side track called Tieman Switch, which was a private siding built by the railroad for the

sole use of the said Tieman. In the contract of building this side track it was provided that no freight could be delivered upon it without the consent of the said Tieman, and it was also provided that Tieman would consider as delivered to him freight when it had been switched on to this siding. The freight in question was delivered by the railroad company upon that track and it was unloaded by certain people other than the correct consignees. The Court held that inasmuch as the bill of lading designated this particular siding as the place of delivery then the company had complied with its contract when it delivered it thereon and could not, therefore, be held for the loss of the goods after it was delivered.

We submit, therefore, that the construction which we seek to maintain as being the correct construction of this phrase in the bill of lading is entirely correct.

JURISDICTION

Granting for the sake of argument, however, that the construction of this provision by the Supreme Court of Mississippi, and by the other courts referred to, is entirely incorrect, nevertheless we insist, that this court has no jurisdiction to construe, interpret or pass upon this provision of the bill of lading, inasmuch as no title, right, privilege or immunity guaranteed to the petitioners by the Federal Constitution, was infringed by such construction of the Supreme Court of Mississippi, nor was any such construction thereof in contravention of any treaty, statute, commission or authority of the United States.

The contract evidenced by the bill of lading was the voluntary act of the carrier and its execution and issuance were not enjoined or made mandatory by any act or authority of any controlling agency of the Federal Government.

The Carmack amendment required of carriers in interstate commerce to issue a through bill of lading, so as to bind connecting carriers and ensure through transportation, but the act did not in any way provide for the terms or conditions that must be contained in that bill of lading, except to provide that if the bill of lading did exempt the carrier from loss or damage caused by it, such a stipulation should be void, and to provide further, that the carrier should be liable to the holder of the bill of lading for the loss or damage caused by it, notwithstanding an exemption in the bill itself. In this case, no connecting carrier was involved, the entire transportation having been undertaken by petitioner railroad company. We contend, therefore, that the act in question could not apply, while petitioners insist that in pursuance of the mandate of the act, a bill of lading was issued in this case.

The Interstate Commerce Commission did undertake in one instance, the adoption of forms of bills of lading for certain carriers. The power to adopt these forms was disputed; and on consideration by the court, it was held, that the Interstate Commerce Commission was "without any authority conferred upon it to draw the carriers bills of lading either in whole or in part. If they are in any respect unjust or unreasonable or unlawful, the courts are open to the parties injured. * * * The question is one of power, (to prescribe bills of lad-

ings), * * * and we think it has no power to make them."

Alaska Steamship Co. et al., vs. U. S. Interstate Commerce Commission, 259 Federal Rep. 713;

United States vs. Alaska Steamship Co. et al., 253 U. S. 113; 64 L. E. 808 (same case;)

Interstate Com. Commission vs. I. C. R. R. Co. 215 U. S. 470; 54 L. E. 280.

The decision in the Alaska Steamship Company and Central of Georgia Railway Co. case above referred to, if not conclusive, is persuasive at least, in our direction, so far as the facts in that case are like the facts in this case, with respect to the power to prescribe forms of bills of lading. But in the present case, as the records of the Interstate Commerce Commission show, the Commission *refused* to assume any authority to prescribe any form of bill of lading, but made suggestions only, on that subject.

Nevertheless, merely because the bill of lading in this case is what is termed a *uniform bill of lading*, counsel for petitioners proceed upon the assumption that it has the authority of law to support it, and on such presumption, they base this proceeding,—while the facts are to the contrary.

We submit that the effect of the issuance of such a bill of lading cannot be that for which the petitioners contend.

This uniform bill of lading is the one which was recommended for adoption in the report of the Interstate Commerce Commission relating to the subject of bills of lading, which report is dated June 27, 1908, and is to be found in volume 14, Interstate Commerce Commission Reports, at page 346. It will be noted from the report as stated, that the Commission did not undertake to prescribe this as a uniform bill of lading, to be used in every case involving an interstate shipment. The form was merely recommended for adoption by the carriers after a conference with the representatives of certain carriers and the shippers of this country. In its report upon the matter, Chairman Knapp said: "Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority."

In the case of Cleveland, C., C. & St. L. R. R. Co. vs. Detlebach, 239 U. S., 588, the Court pointed out the fact that the uniform bill of lading has no binding effect in law, that is, has not the weight of a statute of the United States. It said:

> "The recommendation of the Interstate Commerce Commission for the adoption of a uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight."

We have gone into the question of uniform bills of lading because, as stated, counsel for petitioners seem to have the idea that merely because the uniform bill of lading was used in this instance, the Federal Supreme Court has jurisdiction to construe its terms. We, of course, deny any such contention. We contend that the Federal Supreme Court has no more jurisdiction to con-

strue the terms of a uniform bill of lading as such than it would, as of course, have the right to construe the terms of any other bill of lading. In other words, the uniform bill of lading has no more effect to give this Court jurisdiction than if a special contract to govern the terms of some other particular shipment were the subject-matter of this controversy.

A State court having full jurisdiction has construed a certain clause in that bill of lading, which was issued in this instance, and the Court held that the carrier was liable because his contract, written by him, provided that he would be liable in such a case. It may be said it was the intent of Congress, in enacting the Carmack amendment, to take over the whole domain of interstate commerce, but we submit that the most that can be said of the statute is, that it intended that a carrier should not by any contract exempt itself from the liability for damage caused by it, and, inferentially, that no State statute or court should deny to the carrier the right to limit its liability to the loss or damage caused by it. The cases that have been before the Court so far are cases in which State courts have held that a carrier was responsible for loss or damage other than that caused by it, beyond the terms of an express stipulation in the bill of lading, or in which the limit of liability had been fixed by the shipping contract; and had the Supreme Court of Mississippi decided that the carrier was liable for loss or damage not caused by it, notwithstanding an express stipulation in the bill of lading limiting its liability, then it might well be that the railroad company could contend it had been denied a right guaranteed to it by the Carmack amendment, towit, the right to limit by contract its liability for the damage caused by it. But such is not the case presented here. It

must be borne in mind that unless petitioners have been denied a title, right, privilege, or immunity, guaranteed to them by the Carmack amendment, then this Court will have no jurisdiction.

There is another thing to be considered about the Carmack amendment, and that is, that it does not fix the extent of a carrier's liability in cases involving interstate commerce, but rather fixes a minimum below which the carrier may not exempt itself, and as decided by this Court, it guarantees to the carrier the right to limit its liability by the minimum established by the act. The Carmack amendment does not provide that a carrier cannot and shall not assume any greater liability for loss or damage than that caused by it.

In this instance the carrier issued a bill of lading which contained, among other stipulations, the one the construction of which is the subject-matter of this controversy. Both the trial court and the Supreme Court of Mississippi, in construing the peculiar wording of that particular stiplation, and applying the facts of this case to its meaning, held that the intent of the parties to the contract of carriage was that the carrier should be liable. Is that a denial to the carrier of a title, right, privilege, or immunity arising under the Carmack amendment? We respectfully submit that it is not.

The effect of the decision of the State courts is not that a carrier could not exempt itself from liability under the facts of this case, but it is simply that it has not done so; that is to say, the Supreme Court of Mississippi has not denied to the carrier the right to make a contract which would have limited its liability so as to give it an exemption on the facts presented at the trial, but

it has simply held that the contract actually made between the carrier and the shipper provided for liability in this case. It is also manifest that the decision of the Mississippi court does not involve the question of the validity of a stipulation contained in the bill of lading, but involves the construction of one of its stipulations. The State court has not denied the binding force and effect of any term contained in the bill of lading. It has merely construed a stipulation to mean that the petitioners are liable by reason of the very terms of its contract.

We have heretofore discussed the history of the adoption of the uniform bill of lading and its legal effect as related to the jurisdiction of this Court and of the State courts. It is pointed out in petitioners' brief that several State courts have consrued the particular stipulation in this uniform bill of lading, and that there exists a diversity of opinion as to what it means. We do not think it is worthy of argument that this fact will suffice to give this Court jurisdiction. As stated, the uniform bill of leading stands in the same position as if it had never been issued by many carriers, and in legal contemplation, it is no more than a coincidence that the same contract has come up for construction in the courts of different States.

Recurring, however, to the main point under discussion, that is, whether or not, in truth and in fact, the petitioners have been denied a Federal right, we call the Court's attention to those cases which have been decided by it since the passage of the Carmack amendment, and the opinions of which cases throw light upon the problem.

Adams Express Co. vs. Croninger, 226 U. S., 491.
Chicago, B. & Q. Ry. Co. vs. Miller, 226 U. S., 512.

Missouri, Kan. & T. Ry. Co. vs. Harriman Bros., 227 U. S., 657.

N. O. & N. E. R. R. Co. vs. Nat'l Rice Milling Co., 234 U. S., 80.

Boston & Me. R. R. Co. vs. Hooker, 233 U. S., 97.

George N. Pierce Co. vs. Wells Fargo Co., 236 U. S., 278.

Charleston & W. Car. Ry. Co. vs. Varn Ville Fur Co., 237 U. S., 597.

C., C. & St. L. Ry. Co. vs. Dettleback, 239 U. S., 587.

Sou. Ry. Co. vs. Prescott, 240 U. S., 632.

N. Y., Phila. & Norfolk Ry. Co. vs. Peninsular Produce Exc., 240 U. S., 34.

Atchison, Topeka & S. F. Ry. Co. vs. Harold, 241 U. S., 371.

Ga., Fla. & Ala. Co. vs. Blish Milling Co., 241 U. S., 190.

Cin., N. O. & T. P. Ry. Co. vs. Rankin, 241 U. S., 319.

St. L., I. M. & Sou. Ry. Co. vs. Starbird, 243 U. S., 592.

American Exp. Co. vs. U. S. Horseshoe Co., 244 U. S., 58.

The Croninger case, supra, was the first case after enactment of the Carmack amendment where the question of the validity of a stipulation in a bill of lading limiting the amount which might be recovered in case of loss of goods was decided. The Court held in that case, that such a stipulation was valid and binding, reversing the decision of the State court.

The cases subsequent to the Croninger case, so far as we have been able to determine, have all involved the question of the validity of a stipulation, and in no case has the jurisdiction of this Court been maintained solely to determine the proper construction of a stipulation. We contend that those cases which have held that various stipulations were binding do not overrule the contention which we make here. There is a great deal of difference between the validity of a stipulation and its construction. To deny the validity of a stipulation, we submit, would give to the Federal Supreme Court jurisdiction to determine whether or not the same was valid, and that question would be determined in accordance with a uniform rule as contemplated by the Carmack amendment, but to hold that when a State court has construed a stipulation, and that construction does not agree with the views of the losing side, would create jurisdiction, would be going very much further than this Court has yet gone. Otherwise, it would be an idle thing for this Court to declare that a State court has jurisdiction of such a suit. It would be tantamount to holding that in every

such case if a party were not satisfied with the decision of the State court, then he could seek redress, in the highest court of the land. Such, we submit, was not the intent of Congress, nor is it the intent of those cases to which we have respectfully called the Court's attention.

Justice Lurton, in his opinion in the case of Missouri, Kansas & Texas Ry. Co. vs. Harriman Brothers, supra, succinctly stated the rule by which it might be determined whether or not this Court would take jurisdiction of a suit where it was sought to enforce liability against a carrier in interstate commerce. He lays down the rule in this language:

> "The liability sought to be enforced is a liability of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment to the Hepburn act of June 29, 1906. The validity of any stipulation is such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and as such is withdrawn from the field of State law or legislation. Adams Express Co. vs. Croninger, supra."

The case at bar involves neither the validity of any stipulation in the bill of lading nor the validity of a limitation upon the liability.

Aside from all other considerations, the Federal question now relied upon was never raised or presented in the trial court, and was never raised or presented

in the Supreme Court. There was no plea presenting any Federal question and no issue raised thereon, and, therefore, we submit that regardless of all other considerations, the decision of this court should be adverse to the petitioners.

Mo. Pac. Ry. Co. vs. Taber, 244 U. S. 200; 61 L. E. 1082.

Godchaux Co. vs. Estiponal, 257 U. S. 179; 64 L. E. 213.

THE EFFECT OF THE FINDINGS OF FACTS

On the trial of this cause before the Circuit Court of Coahoma County, at the conclusion of the evidence of both parties, counsel for plaintiffs and for defendants, both requested the court to direct a verdict in their favor. Accordingly, the court on the pleadings and the evidence as they then stood, instructed the jury to return a verdict for the plaintiffs, Nicholls & Company.

This then took away the findings of facts from the province of the jury, and placed them in the bosom of the court.

As was said by the Chief Justice, in the case of Henry Buetell vs. Daniel Magone, 157 U. S., 157, "As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, con-

cluded by the finding made by the court upon which the resulting instruction of law was given. The facts having thus been submitted to the court, we are limited in reviewing its action to consideration of the correctness of the finding of the law, ***and must affirm if there be any evidence in support thereof.***"

The trial court thus having been left to decide the case upon the facts, may be said to have found, among other undisputed things, that the spur track in question was a part of the terminal facilities of the railroad company.

The record shows that without the "proposed" spur track the facilities of the railroad company for handling freight were entirely inadequate. By simple computation from the evidence, the trial court knew that throughout the cotton season, the amount of cotton shipped out of Alligator, amounted to ***seventy-five bales daily.*** The cotton platform owned by the railroad company as shown by the map of petitioners, was only thirty-two feet by fifty-six feet, and this had a half-daily capacity of thirty-five or forty bales only, leaving no room for freight of other character. Thus it is clear that the railroad company was greatly in need of greater facilities. These were supplied by the "proposed" spur track where the loss occurred. The record shows that for twenty years the railroad company had used same not only for cotton, but for handling lumber, coal, grain, and other characters of freight.

It also appears that the railroad company had built the "proposed" spur track at its own expense, not merely as an accommodation to the owner of the gin, but in order to facilitate the movement of freight of all kinds.

thus relieving the congestion incident to insufficient accommodations.

The record shows further that this use by the railroad company of the track was with the permission of the owner of the land, and certainly without any protest from him.

The court may further be said to have found, that the railroad company was guilty of negligence in not moving the car in which the cotton was loaded from danger as soon as it was learned of the fire. The record shows that had the agent and officials of the railroad company acted promptly upon receiving the news of the fire, the car containing the cotton in controversy, could have been removed from danger. Instead, the railroad company did nothing.

The court may further be said to have found, that the railroad company was negligent in having placed other cars in front of the car in which the cotton was loaded, thus preventing said car from being removed by individual effort.

The court may further be said to have found, that the railroad company was negligent in not having sent the car North on the train which passed through Alligator at four P. M., Saturday afternoon, several hours after the car had been loaded and the agent notified. The agent gave as his excuse for not so doing, only that he had been busy doing something else.

We submit that if there is any evidence at all in support of the findings of facts of the lower court, or if the case could have gone off an any basis, theory

or ground of fact, and that a proper decision on the record, could have been reached without the absolute necessity to hinge a decision alone on a construction of the provision of the bill of lading, then there should be an affirmance of the judgments of the Mississippi Courts.

Upon a careful consideration of the record in this case, it does not seem clear that there is any error of which petitioners can rightfully complain, and, therefore, we urge that the case should be affirmed.

Respectfully submitted

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Solicitors for Respondents